No. 90–608

In The

Supreme Court of the United States

October Term, 1990

WILLIAM H. KUCHAREK; SHANGRI–LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; AND GEM BOOKS, INC., doing business as PURE PLEASURE II BOOKSTORE,

Petitioners,

vs.

DONALD J. HANAWAY, Attorney General of the State of Wisconsin,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE CHILDREN'S LEGAL FOUNDATION, NATIONAL FAMILY LEGAL FOUNDATION, AND MORALITY IN MEDIA OF WISCONSIN, INC. IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

JAMES P. MUELLER
2845 East Camelback Road, Suite 740
Phoenix, Arizona 85016
(602) 381–1322

ALAN E. SEARS
3030 North Third Street, Suite 200
Phoenix, Arizona 85012
(602) 241–8520

Counsel of Record
Amici Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Children's Legal Foundation, Inc. (CLF), National Family Legal Foundation and Morality in Media of Wisconsin, Inc., respectfully move for leave to file the attached brief amici curiae. The written consent of the attorney for Respondents has been obtained. The consent of the attorney for Petitioners was requested telephonically and consent was refused.

The interest of the amici curiae is set out below.

Respectfully submitted,

JAMES P. MUELLER
ALAN E. SEARS
Counsel for Amici Curiae

2845 E. Camelback Road
Suite 740
Phoenix, AZ 85016
(602) 381-1322

INTEREST OF AMICI CURIAE

Children's Legal Foundation, Inc. (CLF), formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. It also provides legal assistance to victims of pornography, especially child victims. CLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area. CLF has filed more that 50 amicus curiae briefs with the United States Supreme

Court on virtually every major obscenity and child pornography issue before it in the past three decades. CLF attorneys have participated in trials and appeals in more than 40 states. It has more than 120 affiliated chapters across the nation representing approximately 100,000 supporters.

National Family Legal Foundation is also a public interest organization, providing legal assistance to individuals, organizations, prosecutors and other public officials concerned about the harmful impact of pornography on the quality of life. The Foundation's Executive Director Alan E. Sears is the former Executive Director of the Attorney General's Commission on Pornography. In that capacity he oversaw and supervised the drafting of

that Commission's Final Report, with its Recommendation Number 7 that state legislature should amend obscenity statutes to conform with the current standard enunciated by the Court in Miller v. California.

Morality in Media of Wisconsin, Inc. (MMW) is a non-profit, non-denominational state organization affiliated with the national Morality in Media, Inc. MMW's goal is to stop the trafficking of hard-core pornography by providing education, communication and support for concerned Wisconsin communities and victims of pornography, and as an umbrella organization bringing together into a coalition over 50 state organizations and contacts concerned with the same issues and problems of pornography in Wisconsin. MMW was the

prime coordinator for passage of Section 944.21, the obscenity law at issue in this case.

Children's Legal Foundation, National Family Legal Foundation and Morality in Media of Wisconsin are profoundly concerned with the distribution of obscene materials and its detrimental effect on children and society in general. They believe the Wisconsin law at issue is a constitutional and a necessary method of deterring and eliminating the distribution of obscene materials. CLF filed an amicus curiae brief in this case before the Seventh Circuit.

INTRODUCTION

Petitioners are seeking review of the Seventh Circuit's decision upholding

Wisconsin's obscenity statute as constitutional against both due process and equal protection challenges. Kucharek v. Hanaway, 902 F.2d 513 (7th Cir. 1990).

The Seventh Circuit held that Section 944.21 of the Wisconsin Statutes Annotated might contain an ambiguity as to whether simulated, as well as actual, sexual activities are forbidden. However, the court found that "this will not in itself make the statute vague," and "once the issue is resolved by the Wisconsin courts, the ambiguity will be dispelled, (and) the discretion of the law enforcement authorities of Wisconsin canalized." Id. at 519. The court concluded: "There is no failure of fair notice" to defendants and thus no due process violation. Id.

On the equal protection issue, the Seventh Circuit found a rational basis existed for the statutory exemptions being challenged and that no equal protection problems existed. Id. at 520-21.

The essence of the court's decision was that it was a matter of state statutory construction, best left for Wisconsin courts, and that no federal constitutional questions were at issue.

Amici urge the Court not to grant the Petition for a Writ of Certiorari filed by the petitioners. The Seventh Circuit's decision is not in conflict with any other court of appeals, is not in conflict with a state court of last resort, does not depart from accepted and usual course of judicial proceedings, and has not decided an

important question of federal law which has been unsettled or is in conflict with this Court's decisions (nor do the petitioners allege otherwise.) Additionally, as the brief argument which follows demonstrates, the petitioners are incorrect on the merits of the case.

ARGUMENT

I. Section 944.21 Is Not Unconstitutionally Vague And Meets Due Process Requirements Of Fair Notice.

Section 944.21(2) of the Wisconsin Statutes Annotated defines obscene material to mean:

> [A] writing, picture, sound recording or film which:
>
> 1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

> 2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and
>
> 3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

Subsection (e) of that same section states:

> "Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals.

The "fair warning requirement prohibits the states from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Rose v. Locke, 423 U.S. 48, 49, (1975) (citations omitted). The Court went on to say:

> But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurks uncertainties.' . . . Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.

423 U.S. at 49-50 (citations omitted).

In Miller v. California, 413 U.S. 15 (1973), the Supreme Court set forth guidelines to lead the states in defining obscenity. However, nothing in Miller is meant to be "magical language" which all state statutes must mirror. The Court in Miller specifically stated that: "We emphasize that it is not our function to propose regulatory schemes for the states." Id. at 25.

A state law that regulates obscene material which is limited, as written or construed, by the following guidelines is constitutional. The basic guidelines for the trier of fact must be: (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Miller, 413 U.S. at 24.

The Wisconsin obscenity act is closely tailored to conform to the Miller standards. The petitioners are

inviting the Court to revisit Miller, but as the Court previously noted: "Yet, this is nothing less than an invitation to overturn Miller -- an invitation that we reject." Fort Wayne Books, Inc. v. Indiana, 489 U.S. ___, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989).

The Wisconsin statute specifically defines what sexual conduct falls within its reach: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus, or lewd exhibition of human genitals. Wis. Stat. Section 944.21(2)(e). It is the description or showing of the commission of said specific acts which are prohibited. There can be no doubt as to what kind of sexual conduct, if shown, this statute intends to reach.

The Supreme Court in Ward v. Illinois, 431 U.S. 767 (1976) found that state courts may "authoritatively construe" an otherwise defective statute to conform to the Miller requirements. An argument could be made, and the Seventh Circuit so found, that if allowed the Wisconsin Supreme Court could construe Section 944.21(2) in pari materia with the requirements of Miller [See, Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982)], and as a result "patently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" would be prohibited. But absent the Wisconsin court's opportunity to do so, there is no question that the showing or describing of actual sexual conduct is

prohibited.

The petitioners can not argue with any credence that they do not have fair notice of what conduct is proscribed. They know that the distribution of hard-core pornography may bring prosecution. This Court recognized the problems of defining "obscenity," but yet held that dealers had been given fair notice when it came to hard-core pornography:

> If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States and Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby and consenting adult alike...

Miller, 413 U.S. at 27-28.

The Seventh Circuit found that a possible ambiguity might exist in Section 944.21, but that any ambiguities "can be dispelled at a stroke by

interpretation" and thus not vague in a constitutional sense:

> Either the Wisconsin statute forbids realistic simulations of sex along with actual depictions (provided of course that the simulation as well as the actual depiction is patently offensive), or it does not; once the Wisconsin courts resolve that issue, the ambiguity will be dispelled, the discretion of the law enforcement authorities of Wisconsin canalized.

Kucharek, 902 F.2d at 519.

The issues raised by petitioners are appropriate for the Wisconsin courts to resolve, in that they involve questions of state statutory construction. But in the meantime, even without a judicial opinion construing it, the plain language of Section 944.21(2) provides "fair notice" to dealers of the proscribed materials and

satisfies constitutional due process requirements.

II. THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE IS NOT VIOLATED BY THE STATUTE'S EXEMPTION OF SCHOOLS, LIBRARIES, AND CONTRACT PRINTERS.

Petitioners also complain that the statute exempts schools, libraries, other similar institutions, employees thereof, and contract printers. This, they argue, violates the equal protection clause.

Petitioners' argument is without merit. The traditional yardstick for measuring equal protection claims is the "reasonable basis" test. This standard was set forth in McGowen v. Maryland, 366 U.S. 420, 425-26 (1961):

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to

> the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

In Dandridge v. Williams, 397 U.S. 471, 485 (1970), it was stated:

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

While a more stringent standard is applied in cases involving either a suspect class or a fundamental right, the appropriate standard for review of statutory classifications in obscenity statutes is the "reasonable basis" test. The statutory classification herein does not involve a suspect class, e.g., race

or alienage, nor does it interfere with any fundamental right. Obscenity is not protected by the First Amendment. Miller, 413 U.S. at 23. The application of the "reasonable basis" standard has been utilized in and is consistent with those jurisdictions addressing statutory exemptions in obscenity statutes. See, e.g., Ripplinger v. Collins, 868 F.2d 1043, 1051 (9th Cir. 1989) [validating a cable television exemption]; M.S. News Co. v. Casado, 721 F.2d 1281, 1291 (10th Cir. 1983) [validating an exemption for "school, church, museum, medical clinic, hospital, public library, governmental agency, quasi-governmental agency"]. The Supreme Court has held that the "reasonable basis" test "employs a relatively relaxed standard reflecting the Court's awareness that the drawing

of lines that create distinctions is peculiarly a legislative task..." Massachusetts Board of Retirement v. Margia, 427 U.S. 307, 314 (1976).

Although it may not have been wise to exempt these classes, that is a decision best left to the legislature. Such exemptions are not uncommon in obscenity statutes. Appellate courts routinely uphold exemptions from obscenity statutes. For example, the following cases have upheld sundry exemption for clerks, projectionists, churches, schools, universities, libraries and museums on any one of several legislative goals. State v. Martin, 719 S.W.2d 522 (Tenn. 1986); 4000 Asher, Inc. v. State, 716 S.W.2d 190 (Ark. 1986); Com. v. Stock, 499 A.2d 308 (Pa.Super 1985); State v. Baker, 711

P.2d 759 (Kan.App. 1985); Com. v. Ferro, 372 Mass. 379, 361 N.E.2d 1234 (1977); In re Kimbler, 100 Cal.App.3rd 453, 161 Cal.Rptr. 53 (1979); Com. v. Bono, 7 Mass.App. 849, 384 N.E.2d 1260 (1979); People v. Illardo, 48 N.Y.2d 408, 423 N.Y.S.2d 470, 399 N.E.2d 59 (1979); State v. Lesieure, 121 R.I. 859, 404 A.2d 457 (1979); State v. J.R. Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049 (1973). Indeed, various exemptions from state obscenity statutes are the rule, not the exemption. The A.L.I. Model Penal Code and Commentaries specifically exempts "institutions or persons having scientific, educational, governmental or other similar justification for possessing obscenity material" and "non-commercial dissemination to personal associates of

the actor." Section 251.4(3), Model Penal Code.

In any event, as the district court correctly pointed out, these exemption provisions are severable from the remainder of the statute and the statute would be fully operable without them. Kucharek v. Hanaway, 714 F.Supp. 1499, 1522 (E.D. Wisc. 1989).

CONCLUSION

For the foregoing reasons, Amici urge the Court to not grant a Writ of Certiorari in this matter.

Respectfully submitted,

JAMES P. MUELLER
2845 E. Camelback Road
Suite 740
Phoenix, AZ 85016
(602) 381-1322

ALAN E. SEARS
3030 North 3rd Street
Suite 200
Phoenix, AZ 85012
(602) 241-8520

Counsel of Record for Amici Children's Legal Foundation, National Family Legal Foundation and Morality in Media of Wisconsin, Inc.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amici Curiae Children's Legal Foundation, National Family Legal Foundation, and Morality in Media of Wisconsin, Inc. In Opposition Of The Petition For Writ Of Certiorari" has been sent by U.S. Mail, Postage Prepaid, on this 9th day of November, 1990 to:

Stephen Glynn, Esq.
Shellow, Shellow & Glynn
222 East Mason Street
Milwaukee, WI 53202

Tom Balesteri, Esq.
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

JAMES P. MUELLER